

IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT
JODHPUR

: J U D G M E N T :

S.B. Civil First Appeal No.41/1988.
(Mst. Raje Vs. Banwarlal & Others)

DATE OF JUDGMENT : July 12th, 2007

P R E S E N T

Hon'ble Mr. Justice Gopal Krishan Vyas

Mr. S.G. Ojha, with
Mr. Pawan Ojha, for the appellant.

BY THE COURT :

By way of filing this regular first appeal under Section 96 of the Civil Procedure Code, the appellant is challenging the judgment and decree dated 16.11.1987 passed by the Addl. District Judge, Nohar in Civil Original Case No.7/83, whereby the suit of the plaintiff appellant was dismissed.

According to facts of the case, suit was filed by the appellant against three persons viz., Banwarilal, Khayali Ram and Surja Ram. The plaintiff prayed that the gift-deed executed by respondents No.2 and 3 in favour of respondent No.1 Banwari Lal on 07.02.1983 with regard to property in

question may be quashed. The plaintiff further prayed that decree may be passed against respondent No.1 for permanent injunction to restrain him from interfering in the peaceful possession over the agricultural land which is said to be given as gift by respondents No.2 and 3. It was also prayed in the plaint that the property which is mentioned in para 2 of the plaint, belonging to undivided Hindu family, may not be sold or mortgaged and nor may be alienated in any manner. The main contention in the plaint of the plaintiff-appellant is that she is wife of respondent No.2 Khayali Ram as she was married to him after the death of his first wife who was her elder sister and being member of the family she is co-sharer of the ancestral property belonging to the family of the appellant and respondents No.2 and 3. The plaintiff claimed that the said property cannot be given by way of gift by respondents No.2 and 3 but illegally it has been gifted away by respondents No.2 and 3 to respondent No.1. Therefore, the said gift-deed may be quashed on the ground that she is co-sharer of the property being wife of respondent No.2 Khayali Ram and respondent No.3 is brother of Khayali Ram.

According to plaint, agricultural land situated in khasra No.14 measuring 20 bigha 19 biswa and khasra No.41

measuring 42 bigha 9 biswa as well as residential house situated at village Jorawarpura and one other old house situated at village Jorawarpura including one 'bara' (cattle compound) mentioned in para No.2 of the plaint is property of joint Hindu undivided family and appellant and respondents No.2 and 3 have their respective share in the said property which is still undivided, therefore, being wife of respondent No.2 she is having right to challenge the gift-deed made in favour of respondent No.1 by respondents No.2 and 3.

In the suit, notices were issued and, thereafter, respondent-defendants filed their written-statement jointly. In the written-statement, while denying claim of the plaintiff, specific reply was given that there is no relationship with the appellant-plaintiff and she is not wife of defendant No.2 Khayali Ram. It was submitted that she is only sister of late wife of respondent No.2 Khayali Ram and only with a view to fasten claim upon their family property the suit has been filed by the plaintiff challenging the gift-deed by claiming herself to be wife of respondent-defendant Khayali Ram. In the written-statement, it is mentioned that for some time after the death of wife of Khayali Ram, the plaintiff being sister of the wife of Khayali Ram maintained as aunt the children of respondent No.2; but, there

is no relationship except being sister-in-law of defendant Khayali Ram. It is also submitted that at the time of filing suit in the year 1983 the age of respondent No.2 Khayali Ram was 70 years and he did not get married to the plaintiff.

In the reply, it was specifically mentioned that respondents No.2 and 3 are real brothers and the property in question belongs to them and there is no co-parcenary right in favour of the plaintiff. Both respondents No.2 and 3 have right to transfer the property in any manner, therefore, the suit has been filed narrating false facts. It was also replied that allegation against respondent No.1 Banwarilal are totally false and he has not made any attempt to grab the land of respondents No.2 and 3. It was stated that the allegations with regard to cruelty are also false. It was stated by the defendants in the reply that the allegations against respondent No.1 that by illegally getting the gift-deed, defendant No.1 managed to grab the property of respondent No.2 is totally false.

After filing of the written-statement, the trial Court framed the issues for adjudication upon the controversy. Issue No.1 was framed to the effect that whether the plaintiff is married wife of defendant No.2 and since the claim of the plaintiff to the relief prayed for in the plaint is only based on the plaintiff's

avermment that she is wife of defendant No.2 Khayali Ram, it is not necessary in this appeal to enter into the merit of other issues. At the trial, the plaintiff failed to prove that she is legally wedded wife of respondent No.2 Khayali Ram and , therefore, the trial Court decided this issue against the plaintiff.

It is argued by learned counsel for the plaintiff-appellant that the finding of the trial Court on issue No.1 is totally contrary to record because the second defendant Khayali Ram admitted in his statement before the Court that the plaintiff lived with him after the death of his first wife. It is contended that this fact alone is sufficient to establish that the plaintiff was married to respondent No.2. Learned counsel for the appellant vehemently argued that no major girl, without entering into wedlock with her elder sister's widower, would agree to live with him. According to the learned counsel the situation is only answerable by acceptance of this important fact that the appellant married to the respondent No.2 after the death of her elder sister and, it is urged by the learned counsel, it is not uncommon that after the death of elder sister, the unmarried sister of the deceased may be given in marriage to her brother-in-law to save the family and this is a fact of which the Court may take notice after admission of the respondent No.2 Khayali Ram that after the death of his

wife his sister-in-law, the appellant, lived with him to maintain the children.

It is further argued by learned counsel for the appellant that the conclusion of the trial Court with regard to there being no evidence produced by the plaintiff has no substance because by evidence the plaintiff amply proved that her marriage took place with respondent No.2 and she clearly explained the factum of her marriage in her statement. It is stated in her statement that the "pandit" who performed the rites has expired and, therefore, it is not possible to produce him for evidence. Further, it is submitted that in the rural area it is not customary to have invitation-cards printed. Learned counsel for the appellant vehemently contended that the trial Court has grossly erred in discarding the statement of P.W.-1 Mst. Raje, plaintiff simply on the ground that there is no documentary evidence of the marriage. It is submitted by the learned counsel that in the village area there is no question of preparing any documents in respect of solemnizing a marriage and, at the time of deciding such issue, the learned trial Court is required to make judicial scrutiny in right perspective. It is argued that when there is no direct proof then the probabilities are required to be examined and, in this case, after the admission of the respondent No.2 that

the appellant lived with him after the death of his wife, there is no ground to disbelieve the statement of the appellant-plaintiff. The plaintiff is major woman and she categorically stated before the Court that she was married to respondent No.2 after the death of her sister. It is contended by learned counsel that no woman shall make such statement before the Court unless it is true, more so, when nothing has come on record that the appellant was married to some other person. It is, therefore, contended by learned counsel for the appellant that the learned trial Court has committed serious error while deciding issue No.1 against the plaintiff-appellant.

In this case, though service was effected but nobody appeared for and on behalf of the respondents.

I have scanned the evidence of P.W.-1 Mst. Raje, plaintiff as well as statements of P.W.-2 Jaisa Ram, P.W.-3 Tolaram, P.W.-4 Mularam and P.W.-5 Amilal. It is admitted position on the record that no documentary evidence was produced by the plaintiff for proving the factum of her marriage with respondent No.2. From the statements of P.W.-3 Dularam and P.W.-4 Mularam, it is clear that no specific date of marriage is given in their statements nor it is stated by these witnesses that they were present at the time of marriage nor it is disclosed by them

as to when and where the marriage was solemnised.

P.W.-5 Amilal has almost expressed ignorance about the marriage of the plaintiff with respondent No.2 Khayali Ram. It is significant to note that none of the plaintiff's witnesses stated that they saw the defendant Khayali Ram and plaintiff living together as husband and wife. According to the case of the plaintiff also, at the time of filing suit she was living with her parents for last 2 – 3 years. It is also stated by her that no issue was born to her by the said wedlock.

It may be observed that in the absence of documentary evidence to bear out the truth, corroborative evidence may be taken into consideration. In the year 1983, defendant Khayali Ram was 70 years old and, according to statement of the plaintiff, the marriage was solemnized in the samwat year 2010. Thus, at the time of alleged marriage the plaintiff was not more than 15 years of age. On the date of filing of the suit the plaintiff was 45 years of age and respondent No.2 Khayali Ram was 70 years of age; meaning thereby, even if the statement of the plaintiff is accepted then, at the time of marriage, she was 15 years of age. It is also one of the factors in the case that the issues born to Khayali Ram by elder sister of plaintiff died and respondent No.2 remained issueless and respondent No.3 also

remained issueless. Therefore, the trial Court rightly reached presumed that the intention was to grab the property by filing the suit claiming that she is wife of respondent No.2. It is also observed by the trial Court that according to the statement of the plaintiff if the defendant Khayali Ram was not maintaining her she was to claim maintenance but it has not been done by her. It is also observed in the finding that as per allegation in the plaint, 6 – 7 years ago, she was beaten by respondent No.2 and he asked her to go to her parents' house. However, she did not file any application for restitution of conjugal rights nor in any manner she made attempts for getting maintenance.

There is yet another important aspect of the matter that must be taken note of. There is categorical claim and denial of the factum of marriage in this case. The parties belong to rural set up and appear to be bound by customs, however, there is not an iota of evidence on record of ever calling panchayat though the plaintiff has stated facts in her statement that she was beaten and turned out of matrimonial home by her alleged husband defendant No.2. She has also examined P.W.-2 Jaisa Ram in evidence who is her brother; but, this witness also does not say anything about there having been any panchayat efforts for conciliation whereas in the society of the parties the

panchayat has a formidable standing for making efforts for settling disputes and the panchayat even comes so heavily upon the wrong-doer that step of ostracizing the person from the society may be taken.

In these facts and circumstances, the trial Court arrived at the conclusion that both Khayali Ram and Surja Ram are old-aged persons and there is nobody to maintain them and somehow the plaintiff made attempt to grab their property. From the discussion made hereinabove, in the absence of documentary evidence, even the probabilities weigh against the plaintiff. Therefore, in my opinion, the trial Court has rightly adjudicated upon the issue No.1 with regard to marriage of the plaintiff with defendant Khayali Ram. Accordingly, the finding on issue No.1 arrived at by the trial Court does not warrant any interference.

Since the marriage is not established then the appellant is not entitled to seek any relief based on coparcenary rights.

Consequently, the appeal fails and is hereby dismissed.

(Gopal Krishan Vyas) J.